UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

SEATTLE OPERA ASSOCIATION

Employer

and Case 19-RC-13939

AMERICAN GUILD OF MUSICAL ARTISTS,
AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a Voting Group appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All alternate choristers (including those alternates functioning as temporary regular choristers) employed by the Employer; excluding all auxiliary choristers and all other persons.

FACTS

The Employer is engaged in the operation of an opera company in Seattle, Washington. The Petitioner represents a unit ("Unit") of "choristers" - which term the parties agree includes only "regular choristers"[1] - as well as dancers and certain miscellaneous positions. By this petition, Petitioner seeks a self-determination election among the "auxiliary choristers", including the "alternates", for inclusion in the extant unit. The Employer agrees to the inclusion of the alternates, but contends that the auxiliaries are volunteers, and not statutory employees; or that they are casual employees, to be excluded from any unit.

The employer presents five operas ("productions") annually, each with seven to nine performances. Each production is, generally, preceded by six to eight musical rehearsals and then an equal number of stage rehearsals, first with piano, then with full orchestra. Speight Jenkins is the General Director; Philip Kelsey, the Music Administrator and Assistant Conductor; and Paula Podemski, the Production Supervisor, who, among other duties, supervises the volunteer program.

The regular chorus consists of 36 members, who are selected after an audition by Jenkins. They may be hired from the ranks of the alternates, the auxiliaries generally, or by off the street. The only absolute requirements are the audition and experience in two prior productions in Seattle or elsewhere. Once accepting the position, they are required to agree to participate in 50% of the productions offered to them each year. Their compensation is determined by the contract between Petitioner and the Employer. Generally, they will receive (as of August, 2000) $15.50 per hour of rehearsal time, with a two hour minimum for non-dress rehearsals and 4 hours for dress rehearsals. They are paid $153 per performance.

Regulars are considered more or less permanent, but every two years they must submit to a re-audition with the General Director. If their performance is not satisfactory, they are entitled to a one-year probationary period. All regulars must be used in a particular production before any auxiliaries.

Auxiliary applicants undergo an audition with a musical committee, not including Jenkins. These auditions are held in the off years of the regulars' auditions. Successful applicants become part of the auxiliary pool. Currently there are about 200 in the pool, although only about 100 are considered "active." Auxiliaries are paid a flat $214 for a production, regardless of the number of "services" (sessions worked). They do not have formal periodic re-auditions, although they will receive informal feedback about their musical and non-musical performance. Auxiliaries are not required to accept any tendered production, and failure to do so does not impact availability of future offers. Once they accept an offer and sign a Letter of Intent, they are expected to participate fully, but there is no formal disciplinary system to back up the expectation. However, there is nothing to prevent withholding future opportunities. They may also be summarily removed.

Alternates are a select pool of at least one person per voice section,[2] and a total of up to 16 overall. Alternates must come from the ranks of the auxiliaries, but they need not ever have

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[1] Temporary regular choristers appear to be part of the Unit, since their terms and selection are set forth in the parties' contract.

[2] Soprano, tenor, etc.

performed as an auxiliary. Alternates hold their position for a season. Generally, alternates must pass an audition with the General Director, but they do not face biennial re-auditions. Alternates have right of first refusal for the position of Temporary Regular Chorister, a position created by the temporary absence of a particular regular, such as a sabbatical or leave of absence, or perhaps extended illness.

When alternates function as temporary regulars, they are paid pursuant to the regulars' scale. Otherwise, when functioning as alternates, they are paid $20 per service. Alternates have higher skill levels than do auxiliaries, and are more likely to be chosen for a particular, available, non-regular slot than an auxiliary - at least where higher skill levels are required, or perhaps a greater prominence on stage - but it appears that alternates do not have any priority for any slot over auxiliaries, other than as a temporary regular.

As noted, there is no priority for selection as a (non-temporary) regular based on seniority as an auxiliary, or even based on auxiliary membership. Length of membership, number of appearances - neither gives one any priority, other than a "leg up" gained by having had the chance to be seen and heard by management. Permanent regulars can be filled from any source. Nevertheless, a substantial number of regulars once functioned as auxiliaries. Of the 36 current regulars, at least 17 (and perhaps several more) had been auxiliaries at one time, 3 more had been alternates (possibly there is overlap here, since alternates come from the ranks of auxiliaries), and 10 were hired off the street. The genealogy of the remainder was not immediately clear on the record.

There must always be 36 filled regular slots, but the number actually performing in any production is determined by the nature of the opera. It appears that there is a master list setting forth the minimum chorus size for most operas. Regulars have first refusal rights, before others are used, but 36 are not required for every opera. If all regulars are used, then other slots can be offered to alternates and/or auxiliaries. The total number of auxiliary slots actually available over an entire season varies greatly; reading in reverse chronology from this season, 65, 23,10 and 52 in the last four years.

In the last two seasons, cumulatively, 6 auxiliaries performed in 4 or more of the 10 productions; 20 in 2 or more. Over the past four seasons, cumulatively, 36 performed in at least 2 of 20 productions; 73 in at least 1.

Withholding (and presumably Social Security, etc.) is taken from the pay of regulars and alternates, but not from auxiliaries. All choristers are covered by workmen's compensation. Regulars get a maximum of $4 for parking reimbursement; others do not. There are minor differences in the allocation of tickets for regulars and others, but nobody apparently receives tickets for actual performances. Each chorister performing in any particular production is credited in the program, without distinguishing their particular chorister status.

All choristers it appears continue voice study as a routine practice. Many, including auxiliaries, have other compensated voice positions, such as in church choirs. All choristers have the same costume fitting services and use the same dressing room.

The Employer treats auxiliaries as volunteers in several respects. No withholding is taken, and their compensation is fixed regardless of the number of hours spent. They receive an annual thank-you letter and are eligible to attend a volunteer function. Their handbook is entitled "Auxiliary Chorister Volunteer Handbook." Their compensation, which the Employer views as a kind of "rough justice" to cover parking expenses, is $214 per production. Assuming

an average production has 7 music rehearsals at 3 hours each, 7 stage rehearsals at 4 hours each, and 8 performances at 3-1/2 hours each – admittedly rough estimates - this works out to about $10 per service, or about $3.00 per hour.

CONCLUSIONS

The parties are in agreement, without formal stipulation, that alternates are statutory employees. I join in this conclusion. They receive compensation based on the number of services worked, and their hourly pay is in the area of the federal/state minimum wage.[3] They have the group right to serve as temporary regulars, with substantially enhanced compensation and a reasonable expectancy of doing so individually. They work fairly regularly, far more than the average auxiliary. In addition, they have standard deductions taken. Moreover, the Employer does not treat them as grouped with its undisputed volunteers, such as supernumeraries and score readers.

As to the auxiliaries, the issue is not simple, primarily because of the paucity of cases. In *WBAI Pacifica Foundation*, 328 NLRB No. 179 (1999), in the context of a not-for-profit radio station, the Board found the individuals in question to be volunteers. However, those individuals received no monetary compensation, and often spent their own funds in furtherance of their "shows." They had theoretical entitlements to child care and reimbursement for travel, but virtually no one (for unclear reasons) ever took advantage of these benefits. The Board noted that the breadth normally given to the "employee" definition is "bounded by the presence of some form of economic relationship between the employer and the individual …" Id. at slip op. p. 3. The unpaid staff's relationship with the Employer "has virtually no economic component." Ibid. "They work out of an interest in seeing the station continue to exist and thrive, out of concern for the content of the programs they produce, and for the personal enrichment of doing a service to the community and receiving recognition from the community." Ibid.

No cases were cited involving *some* minimal monetary compensation, and the parties have cited none on brief. The Board, at fn. 3, in *WBAI* noted that there was no contention or evidence that the lack of compensation violated the Fair Labor Standards Act. (FLSA).

In *Tony and Susan Alamo Foundation*, 471 U.S. 290 (1985), a case arising under the FLSA, a religious institution engaged in multiple, clearly commercial enterprises. Its labor was provided by adherents ("associates") who worked entirely without direct monetary compensation, receiving only food, shelter, clothing and medical benefits. The foundation contended they were non-employees. The Court found the proper test to be one of "economic reality", and found the associates to be employees because the associates were entirely dependent upon the Foundation for long periods and expected the in-kind benefits in return for their labor.

In so holding, the *Alamo* Court distinguished a case where individuals trained for about a week as railroad yard brakemen. If they passed the course and were hired, they were paid wages retroactively; otherwise, the trainees received nothing. In that case, the Court held that the FLSA was not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another. The training did not contemplate compensation and the railroad received no

[3] This conclusion is derived by using the same rough assumptions used for the auxiliaries: 22 services (for a total of 77 hours), at $20/service = $440, or about $6/hour.

immediate advantage from the work performed, the Court concluded. See *Walling v. Portland Terminal Co.,* 330 U.S. 148 (1947).

The *Alamo* Court also rejected "open the flood gates" assertions that the legal ramification of making the associates employees would be to find employee status for those who, for example, drove the elderly to church or served church suppers. "Ordinary volunteerism is not threatened …." *Alamo*, at p. 303. The Court noted the Solicitor General's assurances that, in assessing volunteer v. employee status, DOL considered a variety of factors, including receipt of benefits from the organization, whether the activity is less than full-time, and whether the services are of the kind typically associated with volunteer work. Ibid.

The foregoing hardly provide a bright line test. However, based on the entire record, especially the facts described above, on balance, I find that the auxiliaries are not employees, but volunteers. First, I note the lack of true wages. The amount received is trivial, far less than the minimum wage. It is difficult to contemplate one as an employee when there is no minimum wage paid; rather, only an amount sufficient to let an individual roughly break even with out-of-pocket expenses. In fact, it is questionable if that even happens here, if the auxiliary has car expenses, parking, meals in a restaurant, etc. The only other direct "benefit" is two tickets to their production's dress rehearsal (presumably for friends or family) and two tickets to each of four productions' dress rehearsals the following season. There is no showing these tickets have any monetary value or can readily be converted to cash. Second, the trivial amount paid can hardly constitute a substantial portion, or a dependable one, of meeting anyone's life needs. All auxiliaries obviously have substantial alternate income. Third, the relationship is bilaterally voluntary. The Employer need furnish no opportunity to perform, and the individual may decline any and all opportunities, presumably because it is understood the "pay" is paltry, insufficient to constitute a true recompense for the time foregone by participation, or to justify an Opera insistence on participation. Fourth, there is no promise of future benefit. Nobody who performs gains any clear priority for another engagement, although that desire is likely present. Fifth, the Employer treats the auxiliaries as volunteers in multiple ways, different from the treatment of alternates. Sixth, while there is no scientific poll, the overall record supports the conference that auxiliaries participate for the love of music, and the operatic experience, not to "get rich" or to survive financially. (Of course, for many there is also the eternal hope of "discovery.")

It must be conceded that the auxiliaries do not match up with every factor mentioned in the cited cases. They do get *something* monetary, unlike the *Alamo* associates or the WBAI volunteers. Some likely participate not just for artistic pleasure or other psychic benefits, but also to enhance a career by gaining experience, or adding a line to a resume in order to move on to bigger things. Some factors I have pointed out for distinguishing the auxiliaries could also apply to some degree for alternates. In the end, a decision must be made, by examining the respective "packages" of factors, all of the similarities and differences; the "economic reality" is that nobody can be functioning as an auxiliary primarily for immediate financial gain.

Accordingly, I shall include the alternates in the Voting Group, but exclude the auxiliaries.

ELIGIBILITY

There are normally a maximum of 16 alternates at any one time. Petitioner has not suggested any eligibility formula. Employer has suggested eligibility based on performance as alternates in a Seattle Opera production in the prior three seasons. It is not clear if the intent is

one performance in any of the three seasons, or at least are in each of the three seasons. I infer that the former is intended.

A formula is necessary when there is a continuum of workers, from "sporadic" to "highly regular." The intent of a formula is to allow those with a continuing interest in employment to vote, while excluding those who would have minimal interest, as deduced from the frequency of employment. The formula provides the cut-off between "continuing" and "minimal" interest.

Generally, a maximum of 16 alternates are designated, for a season; in the 99-00 season there were 13. The record does not reflect alternates as tending to remain on the list indefinitely; the rosters for the last two seasons show minimal carry-over. But, alternates *are* selected for, and remain on the list, for the entire season. A review of the production records shows that every alternate was in at least two productions during the current season.

I conclude that all alternates for the current season should be permitted to vote. They are the incumbents; they hold the classification for the year. I see no point in granting eligibility to those who might have served as alternates in the past, but do not currently. I perceive no rationale for an eligibility formula extending over several years.

For eligibility purposes, the term "alternate" will also apply to those *alternates*[4] who served as temporary regulars during the 99-00 season. Anyone who was designated as an *alternate* for the 99-00 season and who thereafter quit the position or was removed for cause will not be eligible.

There are approximately 13 eligible voters. They will remain the eligibles at least until the 00-01 designation of alternates becomes final, assuming their eligibility is otherwise maintained.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the Voting Group found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the Voting Group who were designated as alternates for the 99-00 season. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since designation as an 99-00 alternate, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been

[4] The records for the past two seasons show two auxilaries who served as temporary regulars for a production, and one served in two. Neither is a common occurrence and generally not allowable unless all eligible alternates have declined. I deem these temporary regulars – not a part of the alternate group - ineligible since they were not alternates, their service was unusual, and they held a position already in the Unit.

permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by AMERICAN GUILD OF MUSICAL ARTISTS, AFL-CIO. A vote in favor of such representation shall be deemed a vote for inclusion in the existing AGMA Unit.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision 4 copies of an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters must be filed with the undersigned who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Seattle Regional Office, 2948 Jackson Federal Building, 915 Second Avenue, Seattle, Washington, on or before May 10, 2000. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

NOTICE POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by May 17, 2000.

DATED at Seattle, Washington, this 3rd day of May 2000.

/s/ PAUL EGGERT

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